Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. 109.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

ALPHONSINE McGREW, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

As counsel for defendant in error reside in California, they filed their brief herein prior to the receipt of the brief on behalf of the plaintiff in error. They, therefore, file herewith a supplemental brief in reply.

I.

This court has not jurisdiction in this matter (1) *because said plaintiff in error does not claim in or for itself any right under the treaty,* and (2) *because this right under the treaty was first set up in the supreme court of the State of California.*

1. The plaintiff in error does not claim in or for itself any right under the treaty.

This point is fully argued in our brief previously filed herewith.

Plaintiff in error must rely solely upon the decree of divorce and the Hawaiian statute. This statute, and not the decree of divorce, purported to forfeit the wife's title to this policy. This gave a right to the husband, not to any one else. The Insurance Company, in setting up this right, is setting up a right in the husband, exactly as a defendant in ejectment would plead title in a third person. The fact that this husband may have sued the Insurance Company and recovered judgment cannot affect this case, as defendant in error was a stranger to such judgment. If defendant in error were to sue the Insurance Company on this policy in Hawaii, it could not defend by pleading this judgment and payment, but would have to plead the decree of divorce and the statute. Therefore it is now setting up a right under the treaty in a third person, to wit, the husband, and not in itself. The same statement applies to the right now first set up under the Constitution, and the same result must follow. This court cannot take jurisdiction.

2. The right under the treaty was first set up in the supreme court of the State of California.

In our brief heretofore filed we claimed that a right, title, privilege, or immunity under the Constitution or laws of the United States or under a treaty must be specially set up or claimed in the trial court, and we relied upon the decisions of this court in *Spies vs. Illinois*, 123 U. S., 181; Baldwin *vs.* Kansas, 129 U. S., 57; Miller *vs.* Texas, 153 U. S., 538; 11 Wall., 39.

Since writing said brief plaintiff in error has cited the decision of this court in Erie Railroad *vs.* Purdy, 185 U. S., 153, in which this court stated that a Federal question might be first set up in a State supreme court.

In this latter case, however, the court held that such a question could not be raised for the first time in a State supreme court when the rule of practice of said State court does not allow it to pass on questions not raised in the trial court. This decision is applicable to the case at bar. The rule of practice of the supreme court of the State of California is that it will not pass on questions raised for the first time in the supreme court that could have been raised in the trial court. This rule has been announced in a number of decisions of that court, among which we cite the following:

McDonald *vs.* Bear River, 13 California, 201.
Stoddard *vs.* Treadwell, 29 California, 281.
Williams *vs.* McDonald, 58 California, 527.
Anderson *vs.* Black, 70 California, 231.

3. This Federal question was not specially set up or claimed in the trial court so as to give the State supreme court an opportunity to pass on it.

In our opening brief we drew attention to the distinction in this regard between subdivision three of section 709 of the Revised Statutes and subdivisions one and two of the same section.

We cited in support of this distinction Water Power Company *vs.* Street Railway, 172 U. S., 488; Yazoo *vs.* Adams, 180 U. S., 14, as holding that under subdivisions one and

two of section 709 the Federal question need not necessarily be specially set up or claimed if it appears in the record and was decided, or if such question was necessarily involved in the case and the case could not have been decided without deciding such Federal question, but in cases arising under the third subdivision of said section the Federal right, title, privilege, or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court some jurisdiction.

None of the decisions cited by plaintiff in error overrule this distinction.

French vs. Hopkins, 124 U. S., 524, does not hold, as claimed by plaintiff in error, that the Federal question can be raised by implication, nor does it lay down the rule, as claimed by plaintiff in error, that it is sufficient if it appears from the record that the Federal question was raised either expressly or by implication.

The court in this case simply stated that that particular record did not show, either expressly or by implication, that a Federal question had been raised.

Brooks vs. Missouri, 124 U. S., 400, does not hold, as claimed by plaintiff in error, that where a decision of an alleged Federal question was necessary to a judgment rendered the court acquired jurisdiction, but simply said:

"The decision of the alleged Federal question was not necessary to the judgment rendered, and consequently is not sufficient to give us jurisdiction."

Green Bay vs. Patton, 172 U. S., 67, does not hold that it is sufficient if a Federal question was directly involved, so that the court could not have given judgment without de-

ciding it, but does hold "that it is sufficient if it appears from the record that said rights were set up or claimed in the State court in such manner as to bring it to the attention of the court."

Most of the cases cited by plaintiff in error as holding that it is sufficient in order to give this court jurisdiction that a Federal question should necessarily have been involved in the decision of the court were cases arising under subdivisions one and two of section 709, and not, as does the case at bar, under subdivision three of said section. Such cases were:

Murray *vs.* Charleston, 96 U. S., 442.
Craig *vs.* Missouri, 4 Pet., 410.
Eureka *vs.* Yuba, 116 U. S., 410.
Arrowsmith *vs.* Harmoning, 118 U. S., 195.
Furman *vs.* Nichol, 8 Wall., 44.
Dupasseur *vs.* Rochereau, 21 Wall., 130.
Gregory *vs.* McVeigh, 23 Wall., 294.
Des Moines *vs.* Iowa, 123 U. S., 552.

These latter three did not, as claimed by plaintiff in error, arise under the third subdivision of section 709, but arose under the second subdivision, as they called in question, each one of them, an authority exercised under the Constitution of the United States.

In a recent decision, *Sweringen vs. St. Louis*, 185 U. S., 445, this court said:

"We do not hold it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court."

The fact is that this treaty right was not present in the minds of plaintiff in error in the trial court; was not in any way brought to the attention of the trial court, and did not occur to plaintiff in error until the case was presented by it in its brief in the supreme court of the State of California.

It does not seem, from a recent expression of this court, to be sufficient to first present a Federal question in the briefs in the State supreme court. In *New York Central vs. New York*, 186 U. S., 269, this court said:

"But assuming, *without intimating any opinion to that effect*, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the State constitution, was relied upon and that such provision must be set forth."

Previous decisions of this court have held that it is not sufficient to first raise a Federal question under the third subdivision of section 709 in the argument in the supreme court of a State.

It is strenuously insisted, however, by plaintiff in error that this Federal question, to wit, the right claimed under this treaty, was claimed in the trial court in California by the pleadings, proofs, and assignments of error.

We submit that the pleading of the judgment of divorce in the Hawaiian court did not set up any right under this treaty. This judgment of divorce was recognized by the California court, and would be recognized by any court independent of any treaty, because the Hawaiian court obtained jurisdiction over the defendant in that case, and the effect of this judgment is in no way dependent, therefore, in

any way upon any treaty. In fact, the treaty does not apply to such a judgment.

The pleading of the Hawaiian judgment in Carter, administrator of the estate of McGrew, against the plaintiff in error did not raise any Federal question under this treaty, and could not do it, because the defendant in error was not a party to said judgment, and no treaty could make such judgment material or competent against her, no matter where rendered. If said judgment had been rendered in any State of the United States instead of in a foreign country, it would not be material or competent against the defendant in error, and could not be made such, because she was not a party thereto, and therefore not bound thereby.

The same argument applies to the pleading by the plaintiff in error of the payment of this judgment. If the judgment itself could not be material or competent against the defendant in error, the payment thereof could not be material or competent.

The mere pleading of the Hawaiian statute providing for the forfeiture of the defendant in error's interest in this policy of insurance to her husband upon the rendition of the decree of divorce did not specially set up or claim any right under this treaty. If so, it would not be necessary in any case to specially set up or claim any right, privilege, or immunity under subdivision three of section 709, as has been held necessary by this court in *Oxley vs. Butler*, 166 U. S., 648, and numerous other decisions.

Did the pleading of this statute set up or claim in the State trial court a right under this treaty in such manner as to bring it to the attention of the court? The record shows that it did not.

Did the pleading of this statute show that any right under this treaty was present in the mind of the plaintiff in error as required by this court in *Sweringen vs. St. Louis?* The record shows that it did not.

Counsel for plaintiff in error claim that the offering in evidence of the judgment in the suit by the administrator and the payment of that judgment necessarily raised a Federal question under this treaty, and that this evidence was material because the treaty made it material, and that the trial court could not have decided on the materiality of this evidence without considering and deciding this treaty question.

We submit that the materiality of such evidence, to wit, a judgment in an action, in which the defendant in error was not a party, did not and could not depend upon any treaty, but entirely upon the question of State and Federal practice outside of any treaty, to wit, that evidence of a judgment in an action to which a person was not a party cannot be material evidence in an action against said party. No treaty question was or could be necessarily involved in such a decision, and therefore the denial of the treaty right was not the necessary or of any effect in law of such decision.

Counsel for the plaintiff in error claim that by the treaty alone could any extraterritorial effect be given to the Hawaiian judgment in the action by Carter, administrator, against the Insurance Company, and that therefore the refusal to admit or give any extraterritorial effect to such judgment was a denial of a right under the treaty. We submit, as we stated above, that no treaty could give any extraterritorial or any other effect to such judgment against the defendant in error.

It is claimed by plaintiff in error that a Federal question, to wit, the right under this treaty, was necessarily involved in the decision by the California court, and therefore this court has jurisdiction to review such decision.

If our contention is sound, that in all cases arising under subdivision three of section 709 it is not sufficient that a Federal question be involved in a decision of a State court, but it must be specially set up and claimed, then the mere fact that a Federal question was necessarily involved in such decision is not of itself sufficient to give this court jurisdiction.

II.

Plaintiff in error, in its brief in this court, for the first time raises a new point, to wit, that the decision in this case was in conflict with article IV, section 1, of the Constitution of the United States, providing that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and that Congress may by general laws prescribe the manner in which said acts, records, and proceedings shall be proved and the effect thereof, and that prior to the decision by the California supreme court this constitutional provision applied to Hawaii. Plaintiff in error claims that while this question was not specially set up or claimed in the California court, yet that it is an enlargement of and connected with the Federal question raised as to the treaty.

We submit, in the first place, that this claim under the Federal Constitution on its face is neither an enlargement of nor connected with the Federal question raised under the treaty, but, on the contrary, is inconsistent therewith.

If plaintiff in error is protected by a right arising under this treaty, then, of course, it cannot be protected by a right arising under the Federal Constitution, because the former could not co-exist with the latter. A right under a treaty necessitates two foreign independent governments; a right under the Federal Constitution necessitates one general government, or a superior and subordinate or dependent government. Therefore, as this right under the Federal Constitution was not in any way set up or claimed or brought to the attention of the State court, it cannot be raised for the first time in this Supreme Court. Moreover, the transcript shows that the judgment of the trial court in California was rendered October 11, 1897. The Federal question as to the treaty was first raised by the plaintiff in error in the supreme court of the State of California February 2, 1898; and the brief of plaintiff in error shows that the act of Congress annexing the Hawaiian islands and bringing them under the Federal Constitution was not passed until April 30, 1900. This Federal question, therefore, could not have been raised in the supreme court of California prior to April 30, 1900. The raising of it at that time, however, would have been of no effect as to this case so as to compel the giving of full faith and credit to the Hawaiian statute forfeiting the wife's policy, because at that time said statute had been repealed by the Hawaiian legislature (Hawaiian Laws 1896, page 20, act 24). This act of annexation could not raise any Federal question as to the judgment in the case of Carter against The Insurance Company, because, as we have said before, no act or constitution could give any such judgment any effect against the defendant in error. It did not require this act of annexation to give effect

to the decree of divorce in Hawaii, because that was operative any way, and its effect was not denied by the California court.

Plaintiff in error claims that under this constitutional provision, if this court can consider it, that full faith and credit must be given to the Hawaiian decree of divorce, and that this decree of divorce in Hawaii divested the title to this policy of insurance from the defendant in error and vested it in her husband.

We submit that the only effect upon this policy of this decree of divorce in Hawaii was to make operative the statute in Hawaii; that without this statute, even in Hawaii, the title to this policy could not be forfeited, and that, therefore, the giving in this country of full faith and credit to this Hawaiian decree of divorce does not affect the title to this policy.

Even the Hawaiian court, in its opinion in the administrator's action, did not hold that the interest of the defendant in error passed by the decree of divorce to her husband, but that it passed by the statute. There has been no judgment in Hawaii in any action, in which the defendant in error was a party, that has decided as to the title to this insurance policy.

Counsel for the plaintiff in error have argued at some length that under this constitutional provision full faith and credit must be given to the Hawaiian statute and Hawaiian judgments, even though this constitutional provision did not go into effect until after the judgment of the trial court in California. We submit that this argument, however learned, is not in point, because, as we have before stated, the Federal question raised by this constitutional provision was

in no way presented to either the trial or appellate court in California, and under none of the opinions heretofore rendered by this court can this court now consider this question.

Plaintiff in error claims that under this constitutional provision the supreme court of California was bound to give the Hawaiian judgment, in the administrator's action, the same faith and credit as is given it in Hawaii, and that in Hawaii it decided that the title to this policy had passed from the defendant in error and was vested in her husband. We submit that such judgment, even in Hawaii, would not be binding upon the defendant in error. It would not be binding upon her even had it been rendered in the State of California, or in any other State of the Union. It could not be pleaded against her in any action she might bring anywhere upon this policy. It is not true that in this action the Insurance Company litigated the question of the ownership of this policy on behalf of the defendant in error. She was entirely a stranger to this action and was in no way bound by the result of it, and the Insurance Company was in no way authorized to represent her therein.

III.

Plaintiff in error contends that Hawaii was the land in which the goods were, to wit, this policy, and therefore the ownership should be determined by the laws of Hawaii. It bases this contention upon the following reasons:

(1.) That the policy, to wit, the written document, was in Hawaii; and

(2.) Because the policy could be there enforced.

We submit that the written document was merely evidence of the promise of the Insurance Company to pay so much money upon certain contingencies, and that the mere physical location of the written document in no way determined the *situs* of this promise or contract. There is no evidence, even, that this contract of insurance was executed in Hawaii, so as to make it a Hawaiian contract. There is no evidence to show that this policy was applied for in Hawaii, or that the first premium was paid there, or that it was in any sense a Hawaiian contract. Plaintiff in error states these as facts, but there is nothing in the record to sustain it.

It does not appear from the evidence where this contract was executed, unless it may be gathered from the instrument itself that it was executed in New York.

The second reason of plaintiff in error, that this contract of insurance was situated in Honolulu, because it could be there enforced, would also make its *situs* the State of New York, because from its very terms it could be there enforced.

IV.

There has been no dispute among several claimants as to which of them this policy belongs.

Counsel for plaintiff in error contends that defendant in error has stated that such a dispute has arisen by the statement in our brief that "if there had been any determination of the ownership of this policy between several claimants, then by the California judgment the ownership of this policy has been finally decided by the laws and judges of the land wherein the said goods are."

We do not concede that there has been a dispute either in Honolulu or California between several claimants as to whom this policy belongs. We simply meant in the above statement that if there had been a decision in such dispute the only binding decision must have taken place in California, because there the policy was situated.

Plaintiff in error claims that there has been a dispute in Honolulu between claimants to such policy; that the two claimants were the administrator of the estate of Henry McGrew and the Insurance Company, and that the defendant in error was not a necessary party to this dispute in Honolulu. We submit that the only two claimants to this policy are the administrator of the estate of Henry McGrew and the defendant in error; that the Insurance Company in no way represented the defendant in error or was a trustee for her; that in any dispute between those two claimants the defendant in error necessarily must be a necessary party, and that it is admitted that she was not a party to the administrator's action in Honolulu in which the plaintiff in error contends that the dispute took place.

It would be a remarkable conclusion to hold the defendant in error bound by any claim put forward by the Insurance Company in Hawaii, or to hold that the Insurance Company was in any sense a claimant of this policy under the language of the treaty.

The Insurance Company has never claimed any ownership of this policy, and it has not produced any evidence to show that it was authorized by defendant in error to act for her in claiming it, and we do not think it can be held to be a restrictive construction of the treaty to hold that the word

"claimants" in the treaty means only persons who claim an ownership in goods protected by the treaty.

Plaintiff in error contends, however, that it is not necessary under the treaty that there should be actual litigation between the several claimants touching the title to the goods, but that it is sufficient if, in any litigation between any one, it becomes necessary to pass upon the title to goods. We submit that the language of the treaty, "if a question should arise among *several claimants*," cannot be construed to mean "if a question should arise among *any one*."

Plaintiff in error contends that defendant in error is bound by the litigation between the administrator and the Insurance Company according to the spirit of the two Hawaiian decisions, Jardin *vs.* Maderos, 9 Hawaiian Rep., 503, and Kaleialii *vs.* Grinbaum, 9 *id.*, 213. But these cases are not in point, as no one in administrator's suit was one in interest with defendant in error.

We submit that the administrator's judgment and its satisfaction must be eliminated as a false quantity from this controversy, and the contention limited to these questions:

(1.) Has the plaintiff in error claimed any right under the treaty or the Constitution for *itself?*

(2.) Is it not simply claiming a right in another and not in itself?

(3.) Is it in law subrogated to this other person?

(4.) Did it specially set up a right under this treaty as required by law?

(5.) Can this court consider the constitutional point?

(6.) Was not the *situs* of this policy in California when the divorce was decreed?

(7.) Has there been yet any dispute between claimants to this policy?

(8.) Does the treaty apply to this policy?

(9.) Was the title to this policy determined by the decree of divorce alone, or by the statute?

We submit that the principal question before this court is not, as plaintiff in error contends, whether it shall be compelled to pay this policy twice, but whether, if this court has jurisdiction at all, defendant in error is the only proper person to whom, under our laws, this policy should be paid.

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